DEC 1
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 267

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
JOHN P. FLEMING, an Individual, Doing Business as
John P. Fleming Driveaway Service,
Cross-Appellants,
vs.
THE ALTON RAILROAD COMPANY, et al.,
Cross-Appellees

Cross Appeal from Decree of a Specially Constituted
District Court of the United States for the Eastern
District of Michigan, Southern Division

BRIEF FOR CROSS-APPELLANT, JOHN P. FLEMING

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OPINIONS BELOW

The Opinion of the specially constituted District Court of three judges convened in pursuance of Sec. 47, Title 28, U. S. C. A. appears in 36 F. Supp. 898 (R. 29). The report of Division 5 of the Interstate Commerce Commission is reported in 8 M. C. C. 469 (R. 8).

STATEMENT OF GROUNDS OF JURISDICTION

Cross-Appellant, John P. Fleming, contends that a right of cross appeal in this proceeding is conferred under the provisions of Sec. 47, Title 28, U. S. C. A. and Sec. 345, Title 28, U. S. C. A.

STATEMENT OF CASE

The Motor Carrier Act of 1935, Part II of the Interstate Commerce Act (U. S. Code, Supp. I, Title 49, Sec. 301-327) was approved August 9, 1935 and became effective October 15, 1935. This Act regulates transportation by motor carriers engaged in interstate operations and prohibits motor common carriers from transporting property in interstate commerce without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity, but provides that any such carrier who was in *bona fide* operation on June 1, 1935 "over the route or routes or within the territory for which application is made and has so operated since that time" is entitled to such a certificate without further proof that public convenience and necessity will be served by such operation, if application for such certificate be made within 120 days after the effective date of the Act, to-wit, on or before February 12, 1936.

MOTOR CARRIER ACT, SEC. 206(a), NOW SEC. 206(a) PART II, INTERSTATE COMMERCE ACT. SEC. 306(a) TITLE 49, U. S. C. A.

On or before February 12, 1936, within the time so limited, the Applicant, John P. Fleming, doing business as John P. Fleming Driveaway Service, (the Cross-Appellant here), filed an application with the Interstate Commerce Commission, on the form prescribed by the Commission, for a certificate of public convenience and necessity authorizing the transportation of motor vehicles under their own power between all points in certain designated States, under a claim of "grandfather" rights within the provisions of the above cited section of the Motor Carrier Act, based upon claimed *bona fide* operations conducted on and continuously since June 1, 1935 (R. 46).

On July 23, 1936, pursuant to order of the Commission, public hearing on said application was held at Detroit, Michigan, before an Examiner of the Interstate Commerce Commission. Cross-Appellant, Fleming, appeared by counsel and personally testified and documentary evidence was introduced in support of the allegations contained in said application for "grandfather" authority. *All but four of the rail carrier Cross-Appellees herein appeared by counsel in opposition, but did not present any evidence or testimony in support of their opposition* (R. 10). Certain motor carriers appeared by counsel in said proceedings by way of intervention, but not in opposition, and presented testimony on questions relating to the jurisdiction of the Commission (R. 10).

On September 10, 1937, following the filing of briefs by parties of record, the Trial Examiner's Report and Proposed Order was issued (R. 68), to which exceptions were thereafter filed by protesting rail carriers (R. 78).

On January 19, 1938, pursuant to the order of the Commission, oral argument was held before Division 5 of the Interstate Commerce Commission and was participated in by counsel for the rail carrier protestants as well as by counsel for Applicant, Fleming.

On September 19, 1938, the report of the Interstate Commerce Commission, by Division 5, Commissioners Eastman, Lee and Rogers, was issued, 8 M. C. C. 469, confirming in most essentials the report and proposed order of the Trial Examiner and granting to Applicant, Fleming, a substantial part of the authority for which application was made (R. 8). Thereafter, two petitions for reopening, reviewing and reconsidering the Commission's report and order were filed by protestant rail carriers, to which answer was made by Applicant, Fleming, and which petitions were denied (R. 79, 4, 19, 23, 26).

On July 14, 1939, suit was instituted by the rail protestants in the aforesaid proceedings before the Interstate Commerce Commission, as well as other railroads having not theretofore appeared in said proceedings before said Commission, in the United States District Court for the Eastern District of Michigan, Southern Division, under the provisions of Paragraph 28, Sec. 24, Judicial Code (28 U. S. C. A. 41 (28)) seeking to enjoin and annul the aforesaid order of the Interstate Commerce Commission (R. 3).

On November 26, 1940, hearing was held in said suit at Detroit, Michigan, before a specially constituted District Court of three judges comprised of the Honorable Charles C. Simons, Judge of the United States Circuit Court of Appeals, the Honorable Edward J. Moinet, and the Honorable Frank A. Picard, Judges of the United States District Court. The Opinion of the specially constituted District Court was rendered and filed on January 31, 1941 (R. 29). Final judgment and decree was entered April 7, 1941 (R. 36).

The specially constituted District Court in its opinion, judgment and decree denied Cross-Appellant's motion to dismiss the suit, holding that Plaintiff's (Cross-Appellees here) were proper parties to institute and maintain the suit, and likewise modified the order of the Interstate Commerce Commission by excluding from the certificate authorized thereby Cross-Appellant Fleming's authority to operate into the State of Arkansas (R. 35), otherwise the findings of the Commission and its conclusions of law were adopted as the findings and conclusions of the court except as modified (R. 35, 36).

SPECIFICATION OF ERRORS

I.

The specially constituted District Court erred in holding that Plaintiffs (Cross-Appellees here) were parties in interest within the intent and meaning of Sec. 205(h) of the Motor Carrier Act (now 205(g) of Part II, Interstate Commerce Act) and as such were entitled to institute and maintain the within suit.

II.

The specially constituted District Court erred in holding that the Cross-Appellant, John P. Fleming, had abandoned his operations into, through and out of the State of Arkansas.

III.

The specially constituted District Court erred in modifying the order of the Interstate Commerce Commission decided September 19, 1938 (R. 9) by excluding therefrom Cross-Appellant John P. Fleming's authority to operate into the State of Arkansas.

ARGUMENT

I.

THE CROSS-APPELLEES HAVE NO LEGAL STANDING TO INSTITUTE AND MAINTAIN THIS SUIT

In the trial of this suit before the lower court, defendants, United States of America and Interstate Commerce Commission, presented the main argument concerning the above captioned matter. It is Cross-Appellant Fleming's understanding that said defendants will likewise in this appeal deal exhaustively with such subject matter. However, it is felt that due to the importance of the question, this Cross-Appellant should point out to this court his observations in connection therewith. Therefore, in so doing, this Cross-Appellant will attempt to limit argument concerning this question in order that there shall be a minimum of duplication of argument as between the Cross-Appellants.

A. Cross-Appellees Have No Statutory Authority to Institute and Maintain This Suit.

The Cross-Appellees have consistently taken the position that they are entitled to institute and maintain this suit solely by reason of Section 205(g) of Part II of the Interstate Commerce Act (formerly Sec. 205(h) of the Motor Carrier Act) which provides in part that:

> "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under Part I * * ."

Cross-Appellees take the position that this provision gives them a statutory right to maintain this action in

equity seeking to enjoin and annul the order of the Interstate Commerce Commission granting to Cross-Appellant, Fleming, a certificate of convenience and necessity pursuant to the "grandfather clause" of Part II of the Interstate Commerce Act; and that this legal right to maintain such action is the same as provided with respect to railroads as contained in Sec. 1, Paragraph (20) of Part I of the Interstate Commerce Act. Said paragraph (20) provides as follows:

> "Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be *enjoined* by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, *or any party in interest* * * *." (Emphasis supplied.)

It is apparent that the phrase "any party in interest" appears both in Sec. 205(g) of Part II and Sec. 1, Paragraph (20) of Part I of the Interstate Commerce Act. However, it will be noted that the above quoted portion of Paragraph (20) of Section 1 in Part I specifically authorizes such party in interest to invoke the equity relief of the courts by injunction, and the right to invoke such equity relief is granted only in the case of a construction, operation or abandonment by a railroad contrary to the provisions of Sec. 1, Paragraphs (18), (19) or (20). The right of a party in interest to invoke such special equity relief is not granted by the statute with respect to all cases arising under Part I of the Interstate Commerce Act nor against all orders of the Commission entered pursuant to the provisions of Part I. On the contrary, the statutory authority to invoke such special relief extends to a party in interest only in the peculiar and special situations specifically described in Sec. 1, Paragraphs (18),

(19) and (20). It is apparent, therefore, that any other orders of the Commission entered under Part I not relating to these special situations are not subject to attack under the special equity relief by injunction proceeding as authorized in Paragraph (20); but in all such other cases a rail carrier seeking such equity relief must show that it is entitled to maintain such action upon the basis of general equity principles which have been long established.

Surely then the provisions of Sec. 205(g) of Part II, above quoted, do not in any sense broaden or extend the right of a rail carrier to invoke the special relief provided in Sec. 1, Paragraphs (18) through (20) of Part I. This section merely provides that a party in interest shall have the same right of relief as is provided with respect to orders issued by the Commission under Part I. The order issued by the Commission in the within proceeding does not apply to the construction, operation or abandonment by a railroad as particularly described in Paragraphs (18) through (20) of Sec. 1 in Part I; consequently, a rail carrier in this proceeding has no more statutory right under the provisions of Part II of the Interstate Commerce Act to invoke equity relief in this court than such rail carrier would have if the order of the Commission had been entered under Part I of the Act. The issue before this court then as to whether or not Cross-Appellees have a right to institute and maintain this suit cannot be determined merely by deciding whether or not such Cross-Appellees are parties in interest. The question is not only whether the railroads are a party in interest within the meaning of Sec. 205(g) of Part II, but after this question has been determined, the court must then decide as to whether or not the railroad's interest is sufficient to justify them in instituting and maintaining this action and in attempting to invoke the special and unusual equity relief which they are here seeking. The

Cross-Appellees have consistently confused this issue and have taken the position that the only question involved is whether or not they are "parties in interest" within the meaning of Sec. 205(g) of Part II. In this connection Cross-Appellant, Fleming, respectfully submits that the record shows Cross-Appellees have not at any time shown that their interest is sufficient to justify them in maintaining this independent suit and in seeking this special relief; which matter will be more fully treated under Part B of the within Argument.

It must be conceded that if the order of the Interstate Commerce Commission in the within proceeding pertained to the construction, operation or abandonment of a railroad, the Cross-Appellees would then be entitled to invoke the equity relief provided for in Sec. 1, Paragraph (20) of Part I. The specially constituted District Court in its Opinion cites the decisions of this court in the cases of *Texas and Pacific Railroad Company v. Gulf, Colorado and Santa Fe Railroad Company*, 270 U. S. 266, and *West Pacific California Railroad Company v. Southern Pacific*, 284 U. S. 47, in support of its holding that the Cross-Appellees are proper parties in interest within the intent and meaning of Sec. 205(g) of Part II. The court found that the Cross-Appellees and the Cross-Appellant, Fleming, are equally engaged in the transportation of automotive vehicles and that, therefore, the Cross-Appellees are possessed of a special and peculiar interest within the rationale of these two cases. However, it should be pointed out that the question before the court in the cited cases was merely as to whether or not a competing railroad was a "party in interest" within the intent and meaning of Sec. 1, Paragraph (20) of Part I. The court in said cases having determined that a competing railroad was a party in interest, there was no question but that such railroad had a right to maintain an injunction pro-

ceeding under the provisions of Sec. 1, Paragraph (20) of Part I, because the questions at issue in said cases involved the matter of the construction, operation or abandonment of a railroad as specifically described in said Paragraph (20) of Part I.

However, in the within proceeding, the questions in issue are distinctly different. Sec. 205(g) of Part II does not say that a party in interest can maintain an independent suit for an injunction and does not attempt to define what the rights of a party in interest may be, except by general reference to Part I. Cross-Appellant, Fleming, sincerely believes that both the Cross-Appellees and the specially constituted District Court have failed to recognize this question and that by reason thereof the District Court has failed to determine the same.

It is apparent then that even if the Cross-Appellees are parties in interest within the rationale of the two cases above cited, they still have no statutory right to maintain this independent injunction proceeding since this proceeding does not involve any one of the special and peculiar questions of railroad operations specifically described in Sec. 1, Paragraph (18) through (20) of Part I. Therefore, it would seem apparent that if the Cross-Appellees have any legal standing to maintain this action, such standing must depend wholly upon general equity principles and not upon special statutory authority.

B. Cross-Appellees Have No Standing to Institute and Maintain This Suit Under General Principles of Equity.

It would appear that the Cross-Appellees' ultimate purpose in bringing this action is to prevent the Cross-Appellant Fleming from continuing the transportation of automobiles by the "driveaway" method, which transportation the Cross-Appellees contend is competitive with their transportation of automobiles by railroad. There is no contention that the Cross-Appellant Fleming's so-called competition has been unfair in any legal sense and there is no suggestion of fraud or misrepresentation or deceit on the part of Cross-Appellant Fleming affecting the rail carriers. The Urgent Deficiencies Act, under which this suit is brought, prescribes the procedure to be followed in suits which involve orders of the Commission, but this Act makes no change in the substantive law applicable to injunction suits. It has been repeatedly held that a court of equity will act only to preserve a clear legal right of the party seeking its aid; and the function of the court is not to prevent a violation of law but to protect direct legal interests, and the complainant must have something more than a common concern for obedience to law. (*Massachusetts v. Mellin*, 263 U. S. 447, 448.)

This principle is best expressed perhaps in the case of *Western Pacific Railroad Company v. Southern Pacific Company*, 284 U. S. 47, wherein the court made reference to its decision in the case of *Texas & Pacific Railway Company v. Gulf Colorado and S. F. Railway Company*, 270 U. S. 266. In the Texas & Pacific Railway case, the Plaintiff railway sought an injunction to prevent a competitor from building an unauthorized extension into territory already served by Plaintiff. The Plaintiff brought its action seeking an injunction under the provisions of Sec-

tion 1, Paragraph (20) Part I, and the question was raised as to whether the Plaintiff as a competing railroad was a proper party to institute and maintain such action. As set forth hereinabove, the court found that the Plaintiff railroad was a proper party, but based such finding solely and entirely upon the specific language of said Paragraph 20. This court on p. 51 of its decision in the Western Pacific case, in referring to its decision in the Texas & Pacific case, stated as follows:

> "The Texas & Pacific Railway sought to prevent an unauthorized competitor from building an extension into territory already served by it. Prior to the statute, it could not have maintained such a suit, since the competitor's proposed action did not threaten interference with any legal right. No carrier could then demand exemption from honest competition."

It is apparent from this decision that general principles of equity would not entitle the Cross-Appellees in this proceeding to institute and maintain this action seeking equity relief by injunction; and evidently Cross-Appellees concur in this argument since they have constantly maintained that their right to prosecute this action does not depend upon general principles of equity but rather upon the specific statutory authority contained in Sec. 205(g) of Part II and Sec. 1 Paragraph (20) of Part I.

This argument is conclusively supported by the record in the within proceeding, and the facts developed therein. The Cross-Appellees are common carriers by rail and as such engage in the transportation of automobiles in rail cars. On the other hand, Cross-Appellant Fleming transports automobiles over the highway and solely under their own power by the "driveaway" method, as defined and described by the Commission in its order of August 9, 1937, in *Ex Parte* MC 10. Therefore automobiles trans-

ported by Cross-Appellees are delivered to destination as new cars which have not been driven more than a few miles; while those automobiles transported by the Cross-Appellant Fleming have been driven under their own power from point of origin to point of destination. Therefore there is a distinct and fundamental difference between the two mediums of transportation, and as a result the charges for such transportation services are widely divergent. It is difficult to conceive how there can be any actual or real competition between the Cross-Appellees and the Cross-Appellant Fleming. Shippers who desire the particular type of transportation service offered by Cross-Appellees will undoubtedly continue to use such services; whereas shippers who desire the particular driveaway transportation of automobiles as offered by Cross-Appellant Fleming will utilize such type of service either by the Cross-Appellant Fleming, or if his service is not available, then by some other carrier offering such driveaway transportation, or by driving the cars themselves as private carriers.

This fact was apparently recognized by Cross-Appellees at the time of the hearing before the Trial Examiner of the Interstate Commerce Commission, since no testimony or other evidence of record was offered by Cross-Appellees to show the nature of their service or the damage, if any, which would result to their business if the requested authority was granted to the Cross-Appellant Fleming. Throughout the entire history of this proceeding, the Cross-Appellees have entirely failed to allege or to prove that they will suffer irreparable damage or indeed any special damage whatsoever by the continuance of the Cross-Appellant Fleming's operations.

The Cross-Appellees may argue that they are entitled to prosecute this action upon general equity principles in

view of the decision of the Three-Judge Federal Court in the case of *Consolidated Freight Ways, Inc., v. United States et al.*, 34 Fed. Supp. 576. In that case, it was held that a motor carrier plaintiff possessed sufficient standing to bring suit to enjoin the operations of a competitor under an allegedly void order of the Interstate Commerce Commission. However, the evidence of such case showed that both the Plaintiff and the competing Defendant operated in the same manner, transported the same kind of commodities in the same kind of vehicles, and drew their patronage from the same classes of shippers; and furthermore, that the Plaintiff in such case, without operating to capacity, had carried all the freight which had been offered prior to the beginning of the new operations by the Defendant. However, in the within proceeding there is no evidence that the Cross-Appellees' operations are similar to or directly competitive with those of the Cross-Appellant Fleming. In fact there is no evidence whatsoever with respect to this question and Cross-Appellees have made no effort to present any such evidence. The Cross-Appellees have merely alleged that they are competitors with Cross-Appellant Fleming and are prejudiced and injured by the Commission's order but they have totally failed to allege or show that the continuance or non-continuance of the Cross-Appellant Fleming's operations would have any effect upon the prosperity of the Cross-Appellees or would in any way damage their business. There is entirely lacking in this case any suggestion of direct legal damage, present or prospective, against which a court of equity should operate to protect the Cross-Appellees.

C. The Cross-Appellees Have No Standing to Institute and Maintain This Suit by Reason of Their Intervention in the Proceedings Before the Interstate Commerce Commission.

The Cross-Appellees in this proceeding were permitted to appear and participate in the hearing before the Interstate Commerce Commission, but surely this circumstance does not in and of itself entitle the Cross-Appellees to any standing in this court to originate and prosecute the within separate and independent action. In other words, the action of the Commission in permitting the Cross-Appellees to participate in the proceeding before it is in no way binding upon this court and does not in any way guarantee to the Cross-Appellees that they shall have a legal right to maintain and prosecute the instant suit. Whether or not they have a legal right and a proper standing to institute and maintain this suit must necessarily depend upon a determination of the two issues hereinbefore argued, and certainly cannot depend upon whether or not the Commission has permitted them to participate in a hearing before such Commission.

This principle was clearly set forth in the case of *Sprunt & Son v. United States*, 281 U. S. 249, at page 254 wherein the Plaintiffs sought to set aside an order of the Commission which the Plaintiffs contended deprived them of a competitive advantage over their business rivals. In this case this court held:

> "*The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under Sec. 3 of the Interstate Commerce Act. For, their competitive advantage was threatened.* Having this interest, they were entitled to intervene in that administrative proceeding (before the Commission). And if they did so, they became

> entitled under Sec. 212 of the Judicial Code *to intervene as of right in any suit* 'wherein is involved the validity' of the order entered by the Commission. But that interest alone did not give them the right to *maintain an independent suit*, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. *And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.* In the case at bar, the appellants have no *independent right* which is violated by the order to cease and desist." (Emphasis supplied.)

This proposition was again clearly laid down by this Court in the Case of *Pittsburgh & West Virginia Railway Company v. United States*, 281 U. S. 479 wherein the court in discussing its holding in the Sprunt case stated:

> "* * * the mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it. *Sprunt & Son v. United States, Ante*, P. 249."

(See also *Moffat Tunnel League v. United States*, 289 U. S. 113)

It would appear therefore from the foregoing holdings of this court that the Cross-Appellees' standing in this proceeding must again depend upon the determination of the two issues heretofore discussed and must be based upon something more substantial than mere participation in the Commission proceedings which gave rise to the order here involved. The mere fact that the Cross-Appellees were permitted to enter an appearance as

protestants in the proceeding before the Commission has no bearing upon the determination of the question as to whether or not such Cross-Appellees should be permitted to institute and maintain an independent action seeking special relief from this court by way of injunction.

II.

CROSS-APPELLANT FLEMING IS ENTITLED TO AUTHORITY TO CONTINUE HIS OPERATIONS IN THE STATE OF ARKANSAS

The specially constituted District Court held in its decision that the record discloses Cross-Appellant Fleming's last shipment to Arkansas was on May 12, 1935, and his testimony supports a conclusion that in that state his operations had been abandoned; and accordingly the court found that Cross-Appellant Fleming was not entitled to authority to operate in the State of Arkansas. The Cross-Appellant Fleming takes the position that the court erred in weighing the evidence and in making such a statement of fact with respect to operations in Arkansas after the Interstate Commerce Commission upon substantial evidence before it, had reached the conclusion that Fleming's operations in Arkansas had not been abandoned and that Fleming was entitled to operating authority in such state.

It was the declared policy of Congress, in its enactment of the Motor Carrier Act, 1935, "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical and efficient service by motor carriers, etc."

Motor Carrier Act, 1935, Section 202(a).

The provisions of the Motor Carrier Act, 1935, were made applicable to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation and of the procurement thereof, and the provision of facilities therefor, is hereby fixed in the Interstate Commerce Commission."

Motor Carrier Act, 1935, Section 202(b).

The Act imposes a duty upon the Commission to regulate common carriers by motor vehicle and to administer, execute and enforce the provisions of the Act and to prescribe rules, regulations and procedure for such administration.

Motor Carrier Act, 1935, Section 204(a).

It will be quite evident by a reading of the Motor Carrier Act, 1935, that Congress, prior to its enactment of the regulatory act, had familiarized itself with the motor carrier industry and recognized that motor carriers of property could not be placed in one general category and regulated as such without proper recognition of certain differentiations between such carriers, based upon inherent characteristics requiring peculiar treatment. In Section 204(b) of the Act, Congress gave the Commission power to establish such just and reasonable classifications of groups of carriers included in the term "common carrier by motor vehicle" as the "special nature of the services performed by such carriers or brokers shall require." In the so-called "grandfather clause" of the Act, Section 206(a), Congress provided that carriers in *bona fide* operation on June 1, 1935 could, upon proper application, secure operating authority without further proof of public

convenience and necessity upon introduction of evidence showing *bona fide* operations on June 1, 1935 and continuously thereafter "over the route or routes or within the territory for which application is made."

In Section 208(a) of the Act, Congress provided that any certificate issued to a carrier under the "grandfather clause" or otherwise "shall specify the services to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." By the use of the language last above quoted, Congress evidenced a familiarity with the distinction between motor carrier operations over fixed routes and between fixed termini, as opposed to operations over regular routes within a territory, and the United States Supreme Court has so interpreted the Congressional intent.

> "The recognized practices of an industry give life to the dead words of a statute dealing with it. In differentiating between operations over the 'route or routes' for which an application under the 'grandfather clause' is made as against operations 'within the territory,' Congress plainly adopted the familiar distinction between 'anywhere-for-hire' bus operations over irregular routes and regular routes bus operations between fixed termini. Such recognition is implied also in the provision of §208(a), 49 U. S. C. A. §308(a) that 'Any certificate issued under §206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini the territory within which, the Motor Carrier is authorized to operate.' "
>
> *U. S. v. Maher,* 307 U. S. 148.

In October, 1935, the Commission prescribed certain forms for use by motor common carriers of property seeking certificates of public convenience and necessity under the "grandfather clause" of the Act and certain other forms for use by motor common carriers of property in making application for certificates of public convenience and necessity under the remaining provisions of the Act and in each such form the Commission requested a sworn statement as to whether the commodities transported were general commodities or special commodities and whether the operations were performed over regular routes or over irregular routes. If the operations were performed over regular routes, the applicant was requested to designate the terminal origin, terminal destination and intermediate and off-route points served. If the operations were over irregular routes, the applicant was requested to designate the place, places or territory where the main volume of traffic was obtained and the place, places or territory to which such traffic was transported. Obviously, such information would be necessary in order for the Commission to meet the requirements of Section 208(a) in its issuance of authority by specifying the service to be rendered and the routes, fixed termini, if any, or territory within which the applicant should be authorized to operate.

On August 9, 1937, the Commission issued its order Ex Parte MC-10, classifying brokers and motor carriers of property. The Commission cited, as its authority for the adoption of its classification report, the provisions of Section 204 of the Act hereinbefore cited. It stated that need for a classification arises out of the fact that carriers are of various, distinct and differing types and that identification of these types will, in itself, tend to facilitate the process of regulation and that the differing types often require differing characters of regulation.

The Commission further states that it is obvious that such classification is particularly important in connection with the issuance of certificates as it will facilitate the identification and description of the operations to be covered by such authority. The Commission reasoned that provisions should be made for each major type of operation present in the industry today and that practical classification "must not only provide a satisfactory operating sphere for each kind and major type of operator now in existence, but it must also avoid the danger of establishing restrictions which might be burdensome to the industry. The public interest requires that the way be left open for a normal, healthy growth. Any plan which would retard such growth would defeat the purpose of the Act. We have been fully cognizant of these facts throughout the course of our study of this matter."

The Commission pointed out that prior to the issuance of the classification order, its representatives had visited many sections of the country and had interviewed representative operators and representatives of motor carrier organizations and had circularized tentative drafts with a request for constructive criticisms and suggestions. In its issuance of the classification order the various suggestions were incorporated to the best of the Commission's ability.

The classification report separates carriers of property into four well recognized categories, namely, common carriers, contract carriers, private carriers and exempt carriers. It further classifies such carriers on the basis of physical operations into regular route scheduled service, regular route non-scheduled service, irregular route radial service, irregular route non-radial service, and local cartage service. The classification order ultimately places all carriers of property in one or the other of some seventeen

special classes, ranging from carriers of general freight in Class 1 to Class 17, carriers of specific commodities not-grouped. Carriers of motor vehicles are specially classified under group 9, and in discussing this group the Commission says that the group covers transporters of motor vehicles by both truckaway method and driveaway method and that the operations conducted by this group are usually over irregular routes, either in radial movements from a fixed origin to destinations with a radial territory, or pure territorial operations over irregular routes "to, from and between unlimited points of origin and unlimited points of destination within the territory served by such carrier, over irregular routes, in either direction outbound, or back-haul, or in cross movements."

The sworn representations contained in Fleming's application for grandfather authority, together with the documentary evidence introduced in support of the application, and the sworn testimony of Fleming at the public hearing on his application, clearly place his operations within Class 9 of the Commission's Classification Report. The testimony and other evidence shows without dispute that Fleming was engaged in the transportation of motor vehicles, xclusively, and did not confine his operations to a scheduled service over fixed routes and between fixed termini, but offered his services on call to the general public which required operations over irregular routes within the territory offered to be served. The Trial Examiner's report and recommended order in the Fleming case was issued approximately one month following the issuance of the Commission's classification report, and the Commission's final decision, now under attack, was issued approximately one year later.

Prior to the issuance of the Fleming order, and even prior to the issuance of the classification report, the Com-

mission had decided in the case of an automobile transporter seeking grandfather authority that territorial service should be permitted.

> "It obviously was not the intent of the Congress that a carrier must have been in physical operation to all points to which such carrier claims to have rendered service, on the exact date specified in the statute. It is apparent that if such were the intent and purpose of the 'grandfather' clause provision, the effect would be to destroy the business of many small irregular operators, who may not actually have been in physical operation to all points in the territory claimed on the statutory date, but who did serve a great number of points therein within a reasonable time before and subsequent to that date. A more appropriate view of the application of the 'grandfather' clause date in such cases is that a carrier is entitled thereunder to claim the territory or the points which it might reasonably have served by reason of its operations prior to, as well on, the statutory date, and subsequent thereto. In other words, the question in such cases is: What was the extent of the transportation business honestly and openly carried on by the carrier as of that date?"
>
> *George Cassens & Sons*, 1 Motor Carrier Cases 771 (774).

Likewise in a case involving an automobile transporter, decided a few months before the Fleming decision, the Commission again recognized the appropriateness of granting territorial authority to this type of specialized hauler.

> "It is readily apparent that, in defining the territorial limits of a service, such as applicant's, involving a single commodity which does not move directly into the smaller towns because of the absence of dealer-agents, and, except in the larger cities, moves only to a single consignee in each of

> the towns where deliveries are made, a broader grant of authority is appropriate than in the case of services which involve the transportation of numerous commodities moving regularly to all points. It obviously was not the intent of Congress to require that a carrier serve each and every point within a certain territory in order for it to be granted authority under the 'grandfather' clauses of sections 206(a) and 209(a) of the Motor Carrier Act, 1935, to operate over irregular routes to any point within that territory. Otherwise, the business of many irregular-route operators would be destroyed, since many of them have not served every point in the territory for which authority is sought. A more appropriate view is that a carrier is entitled to claim the right to transport to destinations in a particular territory if service has been rendered to most of the points therein prior to the statutory date and if the service has been rendered continuously since except for interruptions in service beyond the carrier's control. This would seem to be particularly true where a carrier transports only one commodity to constantly changing points of destinations and where it is bound under a contract to render a territorial service over irregular routes."

L. C. Robertson, 8 Motor Carrier Cases 32 (33).

In Fleming's case before the Commission, the Trial Examiner pointed out in his report that the railroad protestants were contending that Fleming's authority should be confined to service to the points which he had actually served, and then stated:

> "In deciding that question it is necessary to take into consideration the type of operation, the frequency of the demand of the shippers for which the carrier hauls, and the needs of the public. The record is convincing that applicant's operations are

irregular in nature and necessarily so because of conditions in the industry. The same frequency of service which might be required of a general commodity hauler cannot be imposed on a carrier of a special commodity such as automotive vehicles, nor can operations be confined within the same narrow limits. To place on applicant the restrictions contended for, might well destroy applicant's usefulness."

Sheet 12 of Examiner A. E. Later's Report.

In the Commission's report underlying its grant of authority to Fleming, now here under attack, the evidence of shipments filed by Fleming is carefully analyzed and the Division then states:

"It is clear that transportation of this scope prior to June 1, 1935, raises a difficult question as to whether applicant is entitled to authority to transport to all points in all of the States served. We have uniformly issued authority of that scope to carriers of household goods. Applicant's operations, however, in many respects do not reflect the characteristics of the transportation performed by such carriers. The carrier of household goods seldom transports a series of shipments between two specified points. One delivery to a new point by applicant may be the beginning of a long series of shipments. Applicant is, of course, limited to shipments to points at which the automobile manufacturers have established distribution facilities; a manufacturer could not for many reasons appoint an indefinite number of dealers or distributors for a given territory. Approximately 1,200 vehicles were transported by applicant in the period from January 1934, to June 1935, yet relatively few points were served. This further indicates that appellant's opportunity for service was found at a very limited number of distribution points. An exhibit introduced at the hearing contains figures and

supporting data based upon which it is estimated that in the year 1935, less than seven percent of all new automobiles sold in twenty-four western States were transported by the driveaway method.

"As basis for authority to serve all points in a State, applicant points out that distribution points are constantly shifted from the standpoint of a State-wide area; dealers' accounts changed; and the volume of sales at a given point may show rapid increases or decreases. Should a distribution point be shifted, applicant would be without authority to serve an account theretofore served. In effect, the shifting of a distribution point would render the carrier unable to continue the operation which it had been conducting. Clearly, we must take into consideration the nature or characteristics of a transportation service when issuing a certificate under section 206(a) of the act, the provisions of which require in substance that the authority granted shall permit a carrier to conduct the *bona fide* operations it was conducting on June 1, 1935. In *Reliance Trucking Co., Inc., Contract Carrier Application*, 4 M.C.C. 594, we said that: 'In the case of a common carrier of household goods or of oil field supplies, serving a large territory over irregular routes, we grant certificates under the "grandfather" clause permitting operation to many points to which no freight has actually been hauled. Nor do we require proof, in granting "grandfather" certificates to haul "general commodities", that each and every commodity within that description has actually been carried. The question is whether there has been operation within the "grandfather" period consistent with the holding out in the natural and normal course of business.' It seems to be clear that allowance must be made for frequent changes in points served with respect to any carrier that depends, for its traffic, entirely upon one industry. This principle should obtain especially where the traffic in question is available only

through the distribution and sales of such commodities as automotive vehicles.

"Applicant was engaged in furnishing a highly specialized transportation service. Direct competitors appear to have been few in number, although the record contains no definite statement concerning this phase of the operating conditions. Applicant's service was, according to our view, necessarily confined to deliveries at a very few points, and future opportunity of obtaining traffic, no doubt, will be likewise limited. This is true even though applicant has at all times held his services out to the public generally.

"Protestants' principal arguments are directed to questions of whether applicant may serve all the points in the States for which application is made; whether, in view of infrequent service to various points in the States claimed, certain rights were not thereby abandoned; and whether applicant should or should not be limited to the particular routes from Detroit to key points in the territory actually served, deliveries thereafter to be made over irregular routes. In deciding these questions, it is also necessary to take into consideration the type of operation, frequency of the demand of the consignees for which the carrier performs transportation services, and the nature of the industry served. The record is convincing that the applicant's operation have been, and will continue to be, irregular in nature because of conditions under which he may secure traffic. The same proof with respect to territory served that might be required of a general commodity hauler, therefore, cannot be imposed, nor can operations be confined within the same definite limits. Restrictions of applicant's operations to fixed routes would handicap the conduct of his business, and with exception of shipments to Oregon and Washington, such restrictions apparently would not be in accordance with the

> operations performed on the statutory date. The fixing of specific termini would also prevent his rendering the type of service he has been performing."

It should also be noted that the Commission specifically considered the Cross-Appellant Fleming's operations in Arkansas in its order of September 19, 1938, by Division 5 wherein the Commission stated on Sheet 4:

> "Operations to Arkansas, Texas, Oregon and Washington were not started until 1935. It appears, however, that by June 1, 1935, a fair volume of traffic had been moved. The three shipments to Arkansas aggregated 25 vehicles; four shipments to Texas aggregated 14 vehicles; four shipments to Oregon aggregated 24 vehicles; and five shipments to Washington aggregated 28 vehicles."

The language used by the Commission in this proceeding is not cited as legal authority for the order issued by the Commission, but rather as an indication that the Commission had before it substantial evidence and gave careful consideration to such evidence and decided the case, not arbitrarily and capriciously, but according to its own best judgment in the public interest. It must be remembered that the hearing before the Trial Examiner in this proceeding was held on July 2nd, 1936, at which time the Cross-Appellant, Fleming, introduced his documentary evidence of operations, which evidence had been necessarily prepared some little time prior to the hearing. In this connection it should be borne in mind that the provisions of the Motor Carrier Act 1935 did not require that grandfather applications be filed until February 12, 1936, the hearing on applicant's application thus being one of the first of such hearings. It is therefore apparent that the list of shipments submitted by Cross-Appellant, Fleming,

showing no movements into Arkansas after May of 1935, indicates only that there were no shipments into Arkansas for approximately one year after that date, it certainly does not necessarily prove that Cross-Appellant, Fleming, had abandoned operations into Arkansas. On the contrary, the entire evidence of record, and above quoted portion of the Commission's decision, indicates that the very nature of Cross-Appellant, Fleming's, operations was highly irregular, highly specialized, and service was often infrequent to any particular point. The Commission carefully analyzed these factors and their relation to the operating authority which should be granted to Cross-Appellant Fleming. The evidence shows, and the Commission found, that Fleming had been in actual physical operation within the entire territory granted since 1932, offering services generally to anyone requesting such service in the transportation of a highly specialized commodity by a highly specialized method with resultant inherent restriction on the amount of traffic available, but with corresponding and compulsory lack of confinement to specific destinations due to the characteristics of the transportation service and the characteristics of the distribution methods employed by motor vehicle manufacturers.

The question of what proof is necessary in order to entitle the Cross-Appellant, Fleming, to authority in the State of Arkansas is essentially the same as the question of what proof is necessary to support the balance of the Commission's order. The Cross-Appellees have contended that Cross-Appellant, Fleming's claimed operations are not supported by the "requisite quantum" of evidence. What is the required showing and what is the requisite quantum with respect to Cross-Appellant, Fleming's operations in Arkansas, or for that matter, in the entire territory claimed by Fleming?

The Motor Carrier Act does not establish a standard nor has the Interstate Commerce Commission by regulation established a standard. Fleming answered every question and gave every bit of information required by the Interstate Commerce Commission in the application forms which it prescribed, and offered in evidence such proof as he and his counsel deemed necessary in order to support the sworn allegations in his application for operating authority. The evidence submitted satisfied the Trial Examiner, and subsequently satisfied the Commission. It did not satisfy the railroad protestants, and they attempted, by petitions to reopen, to substitute their judgment for that of the Commission. Having failed in this attempt, they now ask this Honorable Court to substitute its judgment for that of the Commission. At the same time the railroad plaintiffs are unable to assist this Honorable Court by stating what the standard should be. In their pleadings, the railroad plaintiffs admit that the Commission's order was correct in some of its aspects and incorrect in others, but it is unable to draw the line of distinction between that which is justified and that which is not justified. If this Honorable Court attempts to establish such standards and to make such determinations, it may open the door to judicial review of every order which has been entered by the Interstate Commerce Commission in connection with the "grandfather clause" applications under the Motor Carrier Act, 1935.

We submit that it is a well recognized principle of law that in the absence of proof of irregularity in a proceedings before an administrative tribunal, and in the absence of proof that such tribunal committed error in its application of rules of law or in its interpretation of the law, its findings of fact should be treated as conclusive and not subject to judicial review. The Court should not consider the weight of the evidence before the Commission nor test

the soundness of the Commission's reasoning nor substitute their judgment for that of the Commission.

Virginia Railway Co. v. U. S., 272 U. S. 658.

> "The argument for the petitioners necessarily invites the Court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the Court."
>
> *The Los Angeles Switching Case*, 234 U. S. 294 (314).
>
> "The judicial function is exhausted when there is found to be a rational basis for the conclusions by the administrative body. In this instance the care and patience with which the Commission fulfilled its appointed task are plain, even to the casual reader, upon the fact of its report."
>
> *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282 (287).

The administration and enforcement of the Motor Carrier Act, 1935, was delegated by Congress to the Interstate Commerce Commission, which is a body peculiarly fit, by reason of personnel and experience, to decide questions involving transportation in interstate commerce. Accordingly, the interpretations of the Act made by the Interstate Commerce Commission and its administrative practices thereunder should not be disturbed in the absence of compelling reasons, based upon arbitrary or legally erroneous action.

Nearly thirty-five years ago, the Supreme Court of the United States had occasion to review action taken by the Interstate Commerce Commission in which counsel for appellants, in his oral argument, and in supplemental brief, said:

> "I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this court."

Mr. Justice McKenna, delivering the opinion of the Court, answered:

> "To what, then, shall we resort? How shall we determine what 'principles of transportation law' were involved? How determine whether they were recognized and applied, or denied and rejected by the Commission, and, necessarily, by the Circuit Court? An examination of the testimony by concession of counsel is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648; *East Tenn. Etc. Railroad Co. v. Interstate Commerce Commission*, 181 U. S. 1, 27. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to 'knowledge of conditions, of environment and of transportation relations,' has had the witnesses before it and has been able to judge of them and their manner of testifying."
>
> *Illinois Cent. R. R. v. Inter. Com. Comm.*, 206 U. S. 441 (454).

This line of judicial thought has continued through the years and more recently, since the passage of the Motor Carrier Act, 1935, the United States Supreme Court,

speaking through Mr. Justice Frankfurter, has had occasion to state, referring to the Motor Carrier Act, 1935:

> "By this legislation, Congress responded to the felt need for regulating interstate motor transportation through familiar administrative devices, while at the same time it satisfied the dictates of fairness by affording sanction for enterprises theretofore established. Whether an applicant seeking exemption had in fact been in operation within the immunizing period of the statute was bound to raise controverted matters of fact. Their determination Congress entrusted to the Commission."
>
> *U. S. v. Maher*, 307 U. S. 148 (153).

This general underlying legal thought has been aptly phrased by Mr. Justice Cardozo, in speaking of another administrative body, in the following language:

> "True indeed it is that administrative practice does not avail to overcome a statute so plain in its command as to leave nothing for construction. True it is also that administrative practice consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *U. S. v. Moore*, 95 U. S. 760-763; *Logan v. Davis*, 233 U. S. 613 (627); *Brewster v. Gage*, 280 U. S. 327, 336; *Fawcus Machine Co. v. U. S.*, 282 U. S. 375; *Interstate Commerce Comm. v. N. Y., N. H., and H. C. Co.*, 287 U. S. 178. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co. v. United States, supra.*"
>
> *Norwegian Nitrogen Products Co. v. United States*, 28 U. S. 294 (315).

CONCLUSION

On the basis of the facts of record in the instant case, as hereinbefore outlined, interpreted in the light of the decisions which have been cited, we respectfully submit on behalf of Cross-Appellant Fleming that the specially constituted District Court was in error in holding that the Cross-Appellees herein were parties in interest and were entitled to institute and maintain the within suit either by virtue of special statute or under the commonly accepted principles of equity. We also respectfully submit that the specially constituted District Court was in error in making a judicial determination that the Cross-Appellant John P. Fleming had abandoned operations into, through and out of the State of Arkansas and, based upon such judicial determination, in modifying the order of the Interstate Commerce Commission by excluding from such order authority in Cross-Appellant John P. Fleming to operate into the State of Arkansas.

Respectfully submitted,

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Dated: Detroit, Michigan,
November 27, 1941.

SUPREME COURT OF THE UNITED STATES.

Nos. 110 and 267.—October Term, 1941.

The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Charles M. Thomson, Trustee of Chicago and Eastern Illinois Railway Company, et al., Appellants,		
110	*vs.*	
The United States of America, Interstate Commerce Commission and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service.		Appeals from the District Court of the United States for the Eastern District of Michigan.
The United States of America, Interstate Commerce Commission and John P. Fleming, an Individual Doing Business as John P. Fleming Driveaway Service, Appellants,		
267	*vs.*	
The Alton Railroad Company, et al.		

[January 12, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

These cases are an appeal and a cross appeal under § 210 (28 U. S. C. § 47a) and § 238 of the Judicial Code as amended (28 U. S. C. § 345) to review a final decree of a district court of three judges (28 U. S. C. § 47) which modified in part and sustained as modified (36 F. Supp. 898) an order of the Interstate Commerce Commission (8 M. C. C. 469) granting appellee Fleming a certificate of public convenience and necessity as a common carrier by motor vehicle under the so-called "grandfather clause" (§ 206(a)) of the Motor Carrier Act of 1935.[1] 49 Stat. 543, 551, 49 U. S. C. § 306.

[1] The Motor Carrier Act of 1935 is now designated as Part II of the Interstate Commerce Act. 54 Stat. 919.

The findings of the Commission may be briefly summarized as follows: Fleming on and since June 1, 1935, was engaged in *bona fide* operation as a common carrier by motor vehicle "in driveaway service of new automotive vehicles, finished and unfinished, and new automotive vehicle chassis." This driveaway or caravaning method of transportation is performed by individual driving of the vehicle under its own power, by driving one vehicle under its own power and towing a second vehicle attached to the first, or by driving under its own power a vehicle upon which another vehicle is partially or wholly mounted. Shipments by Fleming originated from the factories of automobile manufacturers in Detroit, Michigan, and were made to dealers and distributors in various states. Certain new cars were returned to Detroit in the same manner. Fleming commenced operations in 1933 and between January 1, 1934 and June 1, 1935 transported shipments to one point each in Arkansas and Alabama; to two points each in California, New York, Pennsylvania and Tennessee; to three points each in Washington, Oregon, Kentucky and North Carolina; to four points in Texas; to five points in South Carolina; and to seven points in Georgia. About 1200 vehicles were transported in this period and more than 2100 from 1933 to July, 1936, the time of the hearing. Shipments consisted of from one to sixteen vehicles, shipments of two and four being the most common. Fleming's service was confined to deliveries at very few points in several states due to the fact that he was furnishing a highly specialized transportation service from manufacturers to dealers and distributors. Shipments to most of the states named were numerous. Shipments to other states were fewer in number. Thus the three shipments to Arkansas aggregated twenty-five vehicles, the four shipments each to Texas and Oregon aggregated fourteen vehicles and twenty-four vehicles respectively, and the five shipments to Washington aggregated twenty-eight vehicles. Operations in those four states started just prior to June 1, 1935; but they were sufficient in scope to establish that Fleming was in *bona fide* operation in them on the statutory date. Fleming held his services out to the public generally as a common carrier and operated as such; and he held himself out to transport by the driveaway method between any points in the states for which application was made.

Though his transportation of shipments was restricted to a few points in each of the enumerated states, the Commission held that

he was entitled to transport to all points in all of the states served, with the exception of New York and Pennsylvania as respects which the application was denied. The District Court sustained the order of the Commission in all respects except the operation in Arkansas. As to that it held that his service had been abandoned.

We are met at the outset with the question of the standing of the appellant railroad companies—seventy-one in number—to bring and maintain the suit in the District Court. All but a few intervened in the hearing before the Commission. Each is a common carrier and a competitor of Fleming in some portion of the territory which Fleming is authorized to serve. They rest their right to sue on § 205 (h) of the Motor Carrier Act[2] (49 U. S. C. Supp. V, 305 (h)) which provides that "Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . . ." Sec. 1 (20) of Part I (49 U. S. C. § 1 (20)) authorizes "any party in interest" to sue to enjoin any construction, operation or abandonment of a railroad made contrary to § 1 (18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission but also where it proceeds under a certificate of the Commission whose validity is challenged. *Alabama-Annapolis Ferry Co. v. United States*, 285 U. S. 382. Hence we conclude that § 205 (h) has incorporated by reference the "party in interest" provision of § 1 (20). We do not stop to inquire what effect, if any, the status of appellant railroad companies as intervenors before the Commission had on their right to bring and maintain this suit. Cf. *Chicago Junction Case*, 264 U. S. 258, with *Pittsburgh & West Virginia Ry. Co. v. United States*, 281 U. S. 479. They clearly have a stake as carriers in the transportation situation which the order of the Commission affected. They are competitors of Fleming for automobile traffic in territory served by him. They are transportation agencies directly affected by competition with the motor transport industry—competition which prior to the Motor Carrier Act of 1935 had proved destructive. S. Doc. No. 152, 73d Cong., 2d Sess., pp. 13-27. They are members of the national transportation system which that Act was designed to coordinate. S. Rep. No. 482, 74th Cong., 1st Sess.; H. Rep. No. 1645, 74th Cong., 1st Sess. Hence they are parties in interest within the meaning of § 205(h)

[2] Now § 205(g) of Part II of the Interstate Commerce Act. 54 Stat. 922; 49 U. S. C. § 305(g).

under the tests announced in *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, 270 U. S. 266; *Western Pacific California R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47; and *Chaborne-Annapolis Ferry Co.* v. *United States, supra.*

The appellant railroad companies earnestly contend that the Commission was without authority to authorize Fleming to serve a whole state where, as here, his services had been in fact limited to only a few points in the state. The argument is that any right obtained under the "grandfather clause" should be delimited to the actual area in which the applicant was in *bona fide* operation during the period in question. Sec. 206(a) provides for the issuance of a certificate of public convenience and necessity without proof beyond the fact that the applicant or his predecessor in interest "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made . . . and has so operated since that time." Sec. 208(a) provides that such certificate "shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate." The authority granted Fleming was to operate in the designated territory "over irregular routes" through specified states. It is plain from the statute that operations need not be restricted to specified routes or between fixed termini. But the question remains as to the power of the Commission to authorize operation in an entire state where only a few points in that state had been served.

"Territory" is not a word of art. The characteristics of the transportation service involved as well as the geographical area serviced are relevant to the territorial scope of the operations which may be authorized under the "grandfather clause". While the test of "bona fide operation" within a specified "territory" includes "actual rather than potential or simulated service" (*McDonald* v. *Thompson*, 305 U. S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have restricted prior operations to but a few points in a wide area which the carrier held itself out as being will

ing and able to serve. The Commission has taken the characteristics of various transportation services into consideration in determining the scope of the territory covered by certificates under the "grandfather clause". Thus operations on irregular routes within a wide territory have been authorized in case of common carriers of household goods. *Bruce Transfer & Storage Co.*, 2 M. C. C. 150, *William J. Wenck*, 12 M. C. C. 150. Similar broad authority has been granted common carriers of oil field equipment and supplies. *Charles B. Greer, Jr.*, 3 M. C. C. 483; *Union City Transfer*, 7 M. C. C. 717; *L. C. Jones Trucking Co.*, 9 M. C. C. 740. And a like result has been reached in case of automobile transporters such as the applicant in the instant case. *George Cissens & Sons*, 1 M. C. C. 771. And see *Charles E. Danbury*, 17 M. C. C. 243. The general theory underlying the household goods cases was expressed in *W. J. Wenck*, *supra*, pp. 151-152, as follows:

"Calls for service between the same points are seldom repeated. Traffic is not regular in any given direction. What may be infrequent but fairly regular business to or from a certain State for a small carrier may be only sporadic business for a large carrier; consequently, a frequency of service that might amount to 'grandfather' status rights in the case of the former could conceivably be inadequate in the case of the latter. It would be an impractical solution to carve out oddly shaped areas for service based solely on the frequency of service; consideration must also be given to the general territory served under the holding-out, even if the business in some States may not equal that in other States in the territory."

The Commission took a somewhat similar approach to the problem presented in the instant case. It noted that Fleming was restricted to shipments at points where the manufacturers had established distribution facilities; that those facilities were limited in any given area; that Fleming's opportunity for service was therefore confined to a very few distribution points and his operations were irregular; that less than an estimated seven per cent of all new automobiles sold during 1935 in twenty-four western states were transported by the driveaway method; that distribution points in the automobile industry are constantly shifted; that allowance must be made for frequent changes in points served by a carrier who depends for his traffic entirely upon this one industry; and that Fleming's future opportunity for obtaining traffic will doubtless be as limited as in the past. In view of the scope of his holding out and the nature and characteristics of the highly specialized transportation service rendered, the Commission authorized continuance

of his service to all points in the enumerated states. That is a judgment which we should respect. Certainly we cannot say that it was a wholly inappropriate method for creating that substantial parity between future operations and prior *bona fide* operations which the statute contemplates. The special characteristics of this roving transportation service make tenable the conclusion that Fleming's prior limited opportunity for service could not be preserved unless state wide areas, within the scope of his holding out and partially covered by his previous operations, were kept open for him. That judgment is for the administrative experts not the courts.

Appellant railroad companies also urge that Fleming should not have been awarded any rights under the "grandfather clause" in Washington, Oregon, and California. Before June 1, 1935, Fleming had made five deliveries to three different points in Washington, four deliveries to three different points in Oregon, and at least two deliveries to two different points in California. After June 1, 1935, and prior to the hearing in July 1936, two deliveries were made in Washington, two in Oregon, and apparently several in California. These shipments did not appear to be merely nominal.[3] Thus there was evidence that on and since June 1, 1935, Fleming had been in *bona fide* operation in those states. The weighing of such evidence involves in part a judgment based on the characteristics of the highly specialized transportation service involved. Thus, as we have said, that function is peculiarly one for the Commission not the courts.

Appellant railroad companies also insist that Fleming was not in "bona fide operation" in Oregon because in January, 1936 he obtained in that state a contract carrier permit. The argument is that he could not obtain under the "grandfather clause" common carrier rights in Oregon in the face of his contract carrier status there. Cf. *United States* v. *Maher*, 307 U. S. 148. They further urge that Fleming's operations in Nebraska (one of the states through which his irregular routes were authorzied) were conducted in violation of state law. In that connection reliance is placed on his testimony that in Nebraska he claimed to be

[3] As to California the evidence was less specific than in the other states. Shipping bills showed three deliveries to California aggregating five vehicles, the latest being in December, 1935. In addition there was testimony that shortly prior to the hearing in 1936 deliveries of taxicabs and trucks had been made in that state.

the owner of the vehicles in order to reduce license fees. The expression "in bona fide operation" plainly "does not extend to one operating as a common carrier on public highways of a State in defiance of its laws". *McDonald* v. *Thompson*, *supra*, p. 266. Congress has not, however, conditioned rights under the "grandfather clause" on compliance with state laws. Their violation is material only insofar as it may be relevant to establishing an absence of "bona fide operation". Infractions of state law, however, may be innocent or wilful, minor or considerable. They may or may not concern the right to operate in the state. Furthermore, the status of a carrier under state law may or may not be identical with his status as a common or contract carrier under the Motor Carrier Act. The question whether his operation in a particular state was "bona fide" is a question of fact for the Commission to determine. Such operation might well be in good faith though state laws were infracted. And the fact that an applicant may have to make his peace with state authorities does not necessarily mean that his rights under the "grandfather clause" should be denied or withheld. *See Earl W. Slagle*, 2 M. C. C. 127. Occasional noncompliance with state laws does not *per se* establish a course of conduct which is preponderantly one of evasion. Certainly no such course of conduct can be fairly implied in this case. Our task is ended if there is evidence [illegible] the Commission's finding of *bona fides*. There is such evidence here.

It is urged on the cross appeal that the court below should not have set aside the Commission's inclusion of Arkansas in the certificate. The evidence was that Fleming had served only one locality in Arkansas—the city of Texarkana. He had made three shipments there aggregating twenty-five vehicles. All of those shipments had been made prior to June 1, 1935, the latest being May 12, 1935. Though fourteen months expired between that date and the date of the hearing there was no evidence that any shipments were made to any locality in Arkansas since June 1, 1935. No explanation of that long hiatus was proffered. But § 206(a) requires a finding of "bona fide operation . . . within the territory" not only "on June 1, 1935" but also "since that time". We cannot say that an unexplained failure to make any shipments to Arkansas for over a year "since that time" satisfies the statutory command even though the nature of the highly specialized transportation service involved be given the greatest weight. Cf. *United States* v. *Maher*, *supra*.

A mere holding out will not alone suffice to bridge the long gap extending through and beyond one entire automobile production year, since applicant carries the burden of establishing his right to the statutory grant.

We have considered the other points raised by appellant railroad companies and find them without substance.

Affirmed.

Mr. Justice Roberts did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.